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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS MALONE,

Defendant and Appellant.

B212127

(Los Angeles County
Super. Ct. No. VA101934)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Dewey L. Falcone, Judge. Affirmed.

Julie Sullwold-Hernandez, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D.
Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and
Respondent.

A jury convicted defendant Marcus Malone of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹ and found true the allegation that he personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)).² The trial court sentenced him to six years in state prison, suspended execution of the sentence, and placed him on probation for five years subject to various terms and conditions, including that he serve 174 days in county jail (time served). He appeals from the judgment of conviction, contending that: (1) the trial court erred in precluding his attorney from questioning the victim about the facts underlying the victim's prior misdemeanor conviction of spousal battery; (2) the trial court's questioning of the victim during defense cross-examination deprived defendant of a fair trial; and (3) the evidence was insufficient to prove that he personally inflicted great bodily injury on the victim.³ We affirm.

BACKGROUND

Prosecution Evidence

Around noon on August 4, 2007, Manuel Flores was at a laundromat in Bellflower with Alejandra Villalobos and their two young sons when Derrick Porter, his mother, and defendant Malone arrived to do laundry. Flores became upset that Porter's mother was holding a lit cigarette as she entered the laundromat.

¹ All undesignated section references are to the Penal Code.

² Defendant was tried with codefendant Derrick Dontay Porter, who was convicted of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). We earlier affirmed Porter's conviction in an unpublished decision, B207923, and take our summary of the evidence from that opinion.

³ In his opening brief, defendant also contended that the trial court's oral instructions to the jury failed to mention the elements of the crime of assault with a deadly weapon. Respondent's brief pointed out that defendant was mistaken, and in his reply brief defendant has withdrawn the contention.

He told her he did not appreciate her smoking because his two sons were inside and it was a nonsmoking area. Porter told Flores that he had no right to tell his mother what to do. Flores was in the doorway with his two-year-old son and said that he did not appreciate Porter's mother smoking near his son. Porter replied, "Fuck you and your son. I'll come back and kill both you guys." Flores went inside the laundromat, and defendant left with his mother and Malone.

A few minutes later, Porter and defendant returned and entered the laundromat. Defendant was carrying a metal pipe. Porter grabbed a plastic or rubber trash can. Flores told them to "show some more respect" because his children were present. Porter, who had climbed over the washing machines and onto the counter, rushed Flores from behind and tried to throw the trash can over his head. Defendant then struck Flores on the head with the pipe. Flores managed to partially block the blow, grabbing the pipe and wrestling defendant to the floor. Flores was on his stomach, and Porter was kicking him from behind his head. The attack lasted three to five minutes before Porter and defendant left. Flores tossed his cell phone to Villalobos and asked her to call 911. Paramedics arrived and took Flores to the hospital, where he received 12 staples to his forehead, 5 stitches above his eyebrows, and 3 stitches below his right eye.

Villalobos testified that she saw defendant strike Flores on the head with the pipe and saw Porter hitting him with his fists and also with a trash can. According to Villalobos, the first contact she saw was Porter striking Flores in the face, chest and stomach a "couple [of] times," after which he struck Flores with the trash can and defendant struck him with the pipe. Both defendants struck Flores as he lay on the floor.

Defense Evidence

Defendant called Porter's mother, Sonia Thompson, who testified that Flores used vulgarity and called her names when he told her he did not appreciate her smoking. He also pulled out a knife, which he put back in his pocket as he followed her outside. Porter confronted Flores and asked why he was talking to his mother like that. Flores pulled out his knife again, and Thompson got between them. She suggested that Porter, defendant, and she should just leave, which they did. She later asked Porter and defendant to return to retrieve clothes they had left at the laundromat.

Defendant testified that in the confrontation about the cigarette, Flores used a racial slur in arguing with Porter. Flores also held a knife. The blade opened from the handle, was serrated, and was about three-and-a-half inches long.

According to defendant, when he and Porter returned to the laundromat at Sonia Thompson's request, defendant armed himself with a pole from the trash bin in the parking lot because he knew Flores had a knife and defendant was afraid of being stabbed. As soon as Porter entered the laundromat, Flores began arguing again. Flores approached defendant and "kept fiddling in his pocket" from which he had pulled the knife earlier. Defendant told him to stop, but Flores continued to approach, and partly withdrew his knife so that defendant could see it. Defendant tried to jab him with the pole and backed up toward the door. When Flores still approached, defendant swung the pole at him. Flores blocked the blow, and with his full weight forced defendant to the ground, breaking defendant's arm. Defendant screamed in pain, and did not strike Flores again. Porter punched and kicked Flores, trying to get him off defendant. Finally, Porter pulled Flores off, helped defendant up, and they both left for Kaiser hospital. Defendant later had surgery on his arm.

DISCUSSION

I. *Flores' Conviction of Spousal Battery*

Defendant contends that the trial court erred in precluding his attorney from questioning Manuel Flores about the facts underlying his prior misdemeanor conviction of spousal battery. We find no prejudicial error.

Before trial, the prosecutor disclosed that in 2005 Manuel Flores was convicted of a crime of moral turpitude, namely, a misdemeanor violation of section 273.5, spousal battery, in which the victim was Alejandra Villalobos. The trial court stated that it would “sanitize” the conviction for purposes of examining Flores about it. When defense counsel suggested “more in-depth questioning,” the court stated that it would not permit it. Thereafter, during direct examination by the prosecutor, Flores admitted that in 2005 he “sustained a misdemeanor conviction for spousal abuse.”

Flores’ testimonial admission that he had suffered the conviction was inadmissible hearsay insofar as it was introduced to prove the underlying conduct relevant to impeachment. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300 (*Wheeler*); *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1515, fn. 4.) In permitting evidence of the conviction to impeach Flores, rather than simply evidence of the underlying conduct, the court erred. But the error worked to defendant’s advantage: it informed the jury of the fact of conviction, which defendant was not entitled to put before the jury, and the description of the conviction as being for “spousal abuse” certainly disclosed sufficient evidence to permit the jury to evaluate the conviction for purposes of assessing Flores’ credibility. Thus, defendant suffered no prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

To the extent defendant contends that he was entitled to elicit details concerning the spousal abuse incident because evidence of Flores' violent character was admissible in support of defendant's self-defense theory (Evid. Code, § 1103, subd. (a)(1)), we note that this issue was never mentioned by defense counsel at any time during the trial. Even if we assume that the issue was not forfeited because of the trial court's peremptory ruling precluding examination into the underlying facts of the conviction, and even if we further assume that the court erred in precluding questioning Flores on such a theory, we conclude that any error was harmless. An "[a]ppellate court may not reverse a judgment because of the erroneous exclusion of evidence unless the 'substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by *any other means*.'" [Citations.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) Here, defense counsel did not assert that the evidence was relevant to defendant's claim of self defense, and made no offer of proof as to what evidence he sought to introduce. Thus, we do not know what, if any, evidence defense counsel might have elicited. In this circumstance, it is not reasonably probable that a different result would have been reached in the absence of the court's assumed error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Finally, defendant's claim that the court's ruling violated his federal constitutional rights is unavailing. "Although completely excluding evidence of an accused's defense theoretically could rise to [the] level [of a federal constitutional violation], excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) Defendant mounted a full defense through his testimony and that of Sonia Thompson. Any error in precluding examination into

the details of Flores' prior spousal abuse incident certainly did not rise to the level of federal constitutional error.

II. *The Trial Court's Questioning*

Defendant contends that the trial court's questioning of Manuel Flores concerning whether he first approached defendant violated his right to a fair trial. We disagree.

During cross-examination by defendant's counsel, Flores testified that defendant entered the laundromat first, carrying a pipe, and moved around the aisle to get in position to attack him from the front while codefendant Porter moved to attack him from the back. According to Flores, defendant struck him with the pipe and Flores moved more than 20 feet toward the front door, where he fell. In a somewhat ambiguous exchange, Flores denied that he approached defendant first.

He was impeached with his preliminary hearing testimony in which he testified that he approached defendant (who was holding a pipe), because he knew that defendant was going to approach him. Flores then explained that he approached defendant only after defendant "came around" Flores to attack him.

In later repetitive, recross examination by defendant's counsel, Flores gave confusing testimony concerning whether he approached defendant first: he testified that he approached defendant before defendant approached him; then he testified that that he approached defendant only after defendant came toward him; and then he testified that he approached defendant because he saw him with the pipe.

At that point, the court asked a brief series of clarifying questions culminating with the following: "THE COURT: . . . As he comes around to your aisle from aisle one, you're in aisle . . . two, he comes in the store, he goes down

aisle one, coming around to where you are or in that aisle, is that when you begin to approach him? THE WITNESS: Yes, sir.”

Defendant’s attorney objected to the court’s questioning “on leading grounds, because that doesn’t conform with his testimony.” The court overruled the objection.

Shortly thereafter, when codefendant Porter’s counsel completed his recross examination of Flores, the court again asked a brief series of questions which returned to the subject of who approached whom: “THE COURT: You testified, as I understand it, as Mr. Malone [defendant] comes into the store, he moves to the right aisle, comes around . . . all those washers? THE WITNESS: That’s correct. THE COURT: Then at some point, you approach him as he comes around those washers? THE WITNESS: That’s correct.”

Out of the presence of the jury, defendant’s counsel moved for a mistrial and asked the court to recuse itself: “The questions that the court asked . . . were completely out of order. The court had no basis to ask those questions. . . . The court asked questions that basically validates [*sic*] the alleged victim.” The trial court denied the motion, explaining that Flores’ testimony in response to defense questioning was “somewhat misleading. It wasn’t getting at the truth of what actually transpired. The purpose of my questions [was] to clarify this issue of who approached whom. Mr. Flores indicated that after [he] came around that one aisle, he did approach Mr. Malone. So I merely clarified that particular question and that particular issue.”

We find no error. “A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citations.] The court may not, however, assume the role of either the prosecution or of the defense. [Citation.]

The court's questioning must be "temperate, nonargumentative, and scrupulously fair" [citation], and it must not convey to the jury the court's opinion of the witness's credibility." (*People v. Cook* (2006) 39 Cal.4th 566, 597.) Here, the court did no more than clarify the movements of the parties during the fluid events after defendant, armed with a pipe, and codefendant Porter entered the laundromat.

III. *Great Bodily Injury Allegation*

Defendant contends that the evidence is insufficient to support the great bodily injury allegation under section 12022.7, because the prosecution failed to prove that defendant *personally* inflicted great bodily injury on Flores. (See *People v. Cole* (1982) 31 Cal.3d 568, 572 [section 12022.7 applies only when defendant "directly acted to cause the injury"].) We disagree.

Flores testified that codefendant Porter rushed him from behind and tried to throw a trash can over his head. Defendant then struck Flores on the head with the pipe. Flores managed to partially block the blow, grabbing the pipe and wrestling defendant to the floor. Flores was on his stomach, and Porter kicked him from behind his head. According to Alejandra Villalobos, defendant struck Flores on the head with the pipe and Porter struck him with his fists and also with a trash can. Among other injuries, Flores suffered a laceration on his head that required 12 staples to close.

Construing the evidence in the light most favorable to the judgment (see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the jury could reasonably infer that whatever other injuries Flores suffered, he suffered the head laceration from being struck in the head by the pipe swung by defendant. As a matter of common sense, that injury was consistent with being struck in the head by a pipe. Further, that

injury alone constituted great bodily injury, i.e., “a significant or substantial physical injury” (§ 12022.7, subd. (f)).

Defendant’s reliance on *People v. Magana* (1993) 17 Cal.App.4th 1371 (*Magana*) is misplaced. *Magana* does not stand for the proposition that in a “group beating” scenario, the evidence is insufficient to support a finding of personal infliction of great bodily injury if the prosecution could, but does not, show precisely which injuries were inflicted by which person. In *Magana*, the defendant and his accomplice, using distinctly different guns, shot at a group of people, killing one and wounding two others. (*Id.* at p. 1374.) The prosecution introduced no evidence, expert or otherwise, to prove which defendant shot the wounded victims, although it could have done so. (*Id.* at pp. 1380-1381.) The court of appeal held that the trial court erred in instructing on aiding and abetting in connection with the great bodily injury enhancement, because section 12022.7 requires that the defendant *personally* inflict great bodily injury. The court distinguished prior “group beating” decisions (*People v. Corona* (1989) 213 Cal.App.3d 589 and *In re Sergio R.* (1991) 228 Cal.App.3d 588) on the ground that in each it was impossible to determine which of several injuries the defendant had inflicted. (*Magana, supra*, 17 Cal.App.4th at pp. 1380-1381.) The court added that, in any event, the prosecution had failed to prove that the defendant himself personally inflicted great bodily injury on the victims.

Magana does not apply here. First, the trial court did not instruct on aiding and abetting in connection with the great bodily injury enhancement, nor on the group beating theory adopted by the California Supreme court in *People v. Modiri* (2006) 39 Cal.4th 481, 486, decided after *Magana*. Second, the prosecution did not fail to prove that defendant *personally* inflicted a discrete injury on Flores – the

jury could reasonably infer that the laceration to Flores' head was inflicted by the blow with the pipe.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.